No. 95-157

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals erred in holding that evidence that members of a particular race have been prosecuted for a particular offense is sufficient to justify an order requiring discovery from the government on a claim of selective prosecution, absent evidence that similarly situated persons of a different race have not been prosecuted for that offense.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-67a) is reported at 48 F.3d 1508. The panel opinion of the court of appeals (Pet. App. 68a-104a) is reported at 21 F.3d 1431.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 2, 1995. By order dated June 21, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 28, 1995. The petition for a writ of certiorari was filed on July 28, 1995, and was granted on October 30, 1995 (J.A. 237). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

On April 21, 1992, respondents Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute, and conspiring to distribute, more than 50 grams of cocaine base (crack), in violation of 21 U.S.C. 846. Respondents were also variously charged in four counts with distributing crack, in violation of 21 U.S.C. 841(a)(1), in one count with possessing crack with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and in three counts with using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). J.A. 60-67.

Respondents, each of whom is black, alleged that the United States Attorney's Office had determined to prosecute them because of their race. They sought discovery from the government to obtain information that they asserted would support that claim. J.A. 68. The district court granted the motion for discovery. J.A. 150-151. It also adhered to that ruling in denying the government's motion for reconsideration. J.A. 216, 217. When the government indicated that it would not comply with the discovery order, the district court dismissed the indictment. J.A. 224-226. A divided panel of the court of appeals reversed, concluding that the district court had abused its discretion in ordering discovery. Pet. App. 68a-104a. On rehearing en banc, the court of appeals, by a 7-4 vote, held that the district court had permissibly ordered discovery. It therefore affirmed the district court's dismissal of the indictment. *Id.* at 1a-67a.

1. From February to April 1992, a task force composed of detectives from the Inglewood, California, police department's Narcotics Division and agents of the federal Bureau of Alcohol, Tobacco, and Firearms (ATF) conducted an investigation into a crack distribution ring. From February 13, 1992, to April 6, 1992, confidential informants made seven different purchases of crack from respondents, totalling approximately 124.3 grams. The informants also reported the use of firearms by respondents during the sales. Pet. App. 69a-70a.

On April 8, 1992, task force agents executed warrants to search the hotel room where the drug sales took place, as well as the residences of some of the respondents. The officers arrested respondents Armstrong and Hampton in the hotel room; they also discovered 9.29 additional grams of crack and a loaded gun. Respondents Mack, Martin, and Rozelle were later arrested pursuant to bench warrants. Pet. App. 70a; J.A. 64.

2. Respondents filed a motion for discovery or dismissal of the indictment, alleging that the government had selected them for prosecution because of their race. In support of their motion for discovery, respondents offered only one item of evidence to substantiate their claim of selective prosecution: an affidavit from a paralegal employed by the Federal Public Defender for the Central District of California. J.A. 68-70. The affidavit stated that, based on a review of all cases closed by the Federal Public Defender's Office during 1991 that involved substantive drug offenses or drug conspiracy offenses in violation of 21 U.S.C. 841 and 846, all of the 24 defendants charged with a crack trafficking offense were black. The government opposed respondents'

motion for discovery, arguing that respondents had failed to establish the threshold showing of selective prosecution required to justify an order compelling discovery. J.A. 149-150.

The district court found that respondents' showing was sufficient to justify discovery. The court stated that the number of cases and the time period covered by the affidavit; the comparable charges involved in each case; and the fact that all the defendants were of the same race required the government to provide an explanation. The court ordered the government: (1) to list all cases from the prior three years in which the government charged both crack and firearms offenses; (2) to identify the race of the defendant in each case; (3) to state whether each case was investigated by federal or state law enforcement authorities or by a joint federal and state effort; and (4) to explain the criteria used by the United States Attorney's Office in deciding whether to bring crack charges in federal court. J.A. 161-162.

The government moved for reconsideration of the court's discovery order. In support of its motion, the government submitted affidavits from the two officers who had investigated this case. Those affidavits stated that race had played no role in the investigation and that the case had been referred for federal prosecution because it involved provable crack and firearms offenses that met the U.S. Attorney's guidelines for federal prosecution. J.A. 75-79. The government also submitted the affidavit of the then-Chief of the Criminal Complaints Section of the United States Attorney's Office, who explained that "[a]ll charging decisions are made on the basis of whether a federal offense that meets this Office's guidelines has occurred, the overall strength of the evidence, the deterrence value and federal interest associated with the particular case, the criminal history of the suspects, and other race-neutral criteria." J.A. 80. He further stated that this case met the general criteria because: it involved more than 100 grams of crack, which was in excess of twice the amount necessary for a ten-year mandatory minimum sentence; the case involved multiple sales and multiple defendants, indicating a fairly substantial crack cocaine ring; the case was jointly investigated by federal and state agencies; firearms were used in connection with the drug trafficking; the evidence against respondents, including audio and video tapes of respondents' illegal activities, was strong; respondent Armstrong had made threats against the arresting officers; and several of the respondents had committed prior narcotics and firearms violations. J.A. 81.

In addition, the government submitted an affidavit from the Public Information Officer for the Los Angeles Division of the Drug Enforcement Administration (DEA) and a DEA report on crack. The affidavit stated that, for cultural and historical reasons, particular racial and ethnic groups tend to dominate the distribution of particular drugs. In the officer's experience, black street gangs dominate the distribution of crack in the Los Angeles area. J.A. 73, 74. The DEA report, "Crack Cocaine Overview 1989," detailed the sociological patterns of crack use and distribution in this country. J.A. 84-117. It concluded that Jamaicans, Haitians, and black street gangs dominate the large-scale manufacture and distribution of crack nationwide. J.A. 103.

The government also provided evidence, based on an informal survey of Assistant United States Attor-

neys in the Central District of California, that at least 11 non-black defendants had been indicted on crack charges during the period covered by respondents' affidavit. J.A. 82, 169. Five of those 11 were represented by the Federal Public Defender. J.A. 82, 169. Finally, the government also submitted computerized records showing that from 1989 to 1992 approximately 2,400 defendants had been charged with drug offenses under 21 U.S.C. 841 and approximately 1,700 defendants had been charged with drug conspiracy offenses under 21 U.S.C. 846. J.A. 82.

In response, respondents offered an affidavit from one of respondents' defense attorneys stating that she had spoken to an intake coordinator at a drug treatment center in Pasadena, California, who told her that, based on his experience, there are "an equal number of caucasian users and dealers to minority users and dealers." J.A. 138. A second defense attorney asserted in a declaration that, based on his discussions with judges, prosecutors, and defense attorneys, many non-blacks are prosecuted in state court for crack offenses. J.A. 141. Finally, respondents offered a newspaper article that stated that the federal penalty for crack offenses is higher than the penalty for powder cocaine offenses and that most federal defendants in crack cases nationwide are black. Pet. App. 6a-7a, 33a; J.A. 208-210.

The district court denied the government's motion for reconsideration, stating:

> The statistical data provided by [respondents] raises a question about the motivation of the Government which could be satisfied by the Government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court.
>
> Without the criteria, the statistical data is evidence and does suggest that the decision to prosecute in Federal court could be motivated by race.

J.A. 217. After the government indicated that it would not comply with the court's discovery order, the district court dismissed the indictment. J.A. 224-226.

3. A divided panel of the court of appeals reversed. Pet. App. 68a-104a. The panel held that, to justify discovery on a claim of selective prosecution, a criminal defendant must demonstrate a "colorable basis for believing that 'others similarly situated have not been prosecuted.'" *Id.* at 80a. The panel determined that respondents' 24-case study failed to satisfy that test because it showed only that "others *have* been prosecuted, not that others similarly situated have not." *Ibid.* Without a colorable basis for believing that others similarly situated have not been prosecuted, the panel stated, "the most reasonable conclusion is that the defendant was selected for prosecution because the government believed the defendant committed the offense; the fact that the defendant is a member of a protected class is coincidental." *Ibid.*

Judge Reinhardt dissented. Pet. App. 85a-104a. In his view, a court "must assume * * * that people of *all* races commit *all* types of crimes." *Id.* at 96a. For that reason, Judge Reinhardt concluded that, "[w]here a defendant shows a reasonable statistical basis for the inference that all defendants charged with a particular federal crime over a significant period of time were members of a single race, such a

showing creates, ipso facto, a colorable basis for believing that similarly situated members of other races were not prosecuted." *Id.* at 96a-97a.

4. The court of appeals granted rehearing en banc to resolve a conflict in its cases over the standards governing discovery when a defendant claims selective prosecution. By a 7-4 vote, the court held that the district court had not abused its discretion in ordering discovery in this case. Pet. App. 1a-67a.

The majority first held that a district court has discretion to order discovery on a claim of selective prosecution when "the evidence provides a colorable basis for believing that discriminatory prosecutorial selections have occurred." Pet. App. 8a. Rejecting the view expressed in *United States* v. *Bourgeois*, 964 F.2d 935, 940 (9th Cir.), cert. denied, 113 S. Ct. 290 (1992), that discovery should be ordered only in the rare case, the en banc court held that the applicable standard does not set a "high threshold" to obtain discovery. Pet. App. 9a. Instead, it requires defendants to produce "some evidence tending to show the essential elements of the claim," a standard that is met when the evidence is "more than frivolous and based on more than conclusory allegations," and when defendants "make good faith efforts to obtain whatever evidence is readily available, as well as to provide whatever evidence is already in their possession." *Id.* at 8a, 12a. Because the court believed that proving a case of selective prosecution is difficult and that the information necessary to support such a claim may be in the government's exclusive possession, the court concluded that a more substantial threshold showing should not be required. *Id.* at 11a-12a. The court also held that, by itself, statistical information concerning whom the government has prosecuted can establish a

prima facie case of race-based selective prosecution. *Id.* at 10a & n.1. Concluding that the standard for obtaining discovery should be lower than that required for a prima facie case, the court held that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim." *Id.* at 11a.

Applying those standards, the court held that respondents' identification of 24 black crack defendants was sufficient to establish a "disparity," and therefore to warrant discovery. The court stated that, although "such a small number of cases does not conclusively establish either of the elements of selective prosecution * * *, the fact that every single crack defendant represented by the Federal Public Defender in all cases that terminated during 1991 was black provides a colorable basis for believing that the challenged prosecutorial policies are driven by discriminatory motives and yield discriminatory effects." Pet. App. 16a. The government argued that respondents' affidavit failed to establish a disparity and thus was inadequate to justify discovery because it "shows only that blacks have been prosecuted, not that others of different races and similarly situated have not." *Id.* at 18a. The court concluded, however, that it was proper to infer a disparity, despite the absence of a comparison pool, because of a "presumption that people of all races commit all types of crimes." *Id.* at 19a. Otherwise, the court said, "we would be accepting unwarranted racial stereotypes." *Id.* at 19a n.6. The court therefore inferred a showing of racial disparity sufficient to warrant discovery. The court also rejected the government's contention

that no evidence of discriminatory purpose had been presented. Rather, it expressed the view that an unexplained race-based "disparity" is sufficient evidence of discriminatory intent to justify discovery. *Id.* at 25a.

Chief Judge Wallace concurred in the judgment. Pet. App. 28a-31a. He rejected the majority's holding that the discovery threshold in a selective prosecution case should not be "high." In his view, "a high threshold 'is appropriate because courts are ill equipped to assess a prosecutor's charging decisions, and oversight of prosecutorial decisions could undermine effective law enforcement.'" *Id.* at 29a. Nevertheless, he concurred in the result in this case because of his view that an appellate court should not overturn a district court's discovery order absent a clear error in judgment. *Id.* at 29a, 31a.

Judge Rymer, joined by Judges Leavy, T.G. Nelson, and Kleinfeld, dissented. Pet. App. 32a-67a. Judge Rymer summarized her disagreement with the majority as follows:

> For the first time in this circuit or any other, the en banc court has held that a raw number of prosecutions, without reference to a comparison group and without evidence that others, similarly situated except for their race, have not been prosecuted, provides a colorable basis for the existence of both discriminatory effect and discriminatory intent sufficient to order discovery from the government in connection with a criminal defendant's selective prosecution defense. Also, though both the Supreme Court and this circuit have made clear that discriminatory effect and discriminatory intent are two different elements,

> each of which must exist, the majority's opinion effectively collapses intent into effect by holding that both may be shown by the same, insubstantial statistic. Additionally the opinion has formally removed the "high threshold" that, until now, we explicitly (and other circuits implicitly) have required to be met before discovery relating to a selective prosecution claim can be ordered. In so doing, the majority opinion radically, and unnecessarily, rewrites the law of selective prosecution.

Id. at 32a. Judge Rymer concluded that, in view of the majority's relaxed standard for ordering discovery, government resources that would better be spent on prosecuting crime will instead be devoted to "chasing statistics." *Id.* at 67a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that discovery on a claim of selective prosecution may be ordered based solely on evidence that members of a particular race have been prosecuted, without any evidence that similarly situated persons of a different race have not been prosecuted.

A. The government has broad prosecutorial discretion, and courts are properly reluctant to subject particular exercises of that discretion to scrutiny. The reasons are that prosecutorial discretion is a core element of the Executive's power under Article II; courts are ill-equipped to evaluate the many factors that affect the decision to prosecute; judicial inquiry into a prosecutor's decisions can chill law enforcement; and judicial scrutiny of charging decisions diverts a criminal proceeding from its central purpose: determining whether the defendant is

guilty of the charges against him. *Wayte* v. *United States*, 470 U.S. 598, 607 (1985).

Prosecutorial discretion is nonetheless subject to equal protection limits. The Constitution is violated when a defendant establishes that (1) similarly situated persons of a different race have not been prosecuted and (2) the difference in treatment is motivated by race. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886). Because of the unique considerations implicated by judicial inquiry into an exercise of prosecutorial discretion, however, a defendant must show both elements of a selective prosecution claim through exceptionally clear proof.

The special considerations involved when courts review a substantive claim of selective prosecution also bear on the standard for obtaining discovery from the government on a claim of selective prosecution. In order to avoid encroachment into an area that the Constitution reserves to the Executive Branch, and unwarranted litigation on an issue that is collateral to the defendant's guilt, judicial inquiry should not even begin until there is a substantial and concrete basis for suspecting unconstitutional conduct. Accordingly, discovery on a claim of race-based selective prosecution may not be ordered unless a criminal defendant makes a "substantial threshold showing" both that similarly situated persons of a different race have not been prosecuted and that the difference in treatment is motivated by a racially discriminatory intent.

B. Because proof of improper selection is an indispensable element of a selective prosecution claim, a criminal defendant must introduce solid and credible evidence on it at the discovery stage. Accordingly, the courts of appeals have uniformly held that

discovery on a claim of selective prosecution is unwarranted unless a defendant makes a threshold showing of "selection," *i.e.*, that similarly situated persons were not prosecuted.

The requirement that a defendant make a showing that similarly situated persons have not been prosecuted is easily administered by courts. It is therefore a particularly practical way to identify those few cases worthy of further judicial inquiry. At the same time, because evidence concerning similarly situated offenders is not in the government's exclusive possession, requiring criminal defendants to introduce such evidence will not cut off meritorious claims prematurely.

Under the correct legal standard, respondents' evidence that all of the 24 crack prosecutions closed by the Federal Public Defender in 1991 involved black defendants was insufficient to justify a discovery order. It demonstrates only that blacks have been prosecuted, not that others similarly situated have not. The district court therefore acted on the basis of an incorrect understanding of law and consequently abused its discretion in ordering discovery.

C. In upholding the discovery order in this case, the Ninth Circuit dispensed with any requirement to show that similarly situated offenders were not prosecuted. Its reasons for diluting the required showing, however, are unsound.

The court of appeals concluded that race-based selective prosecution claims differ from other selective prosecution claims: according to the court, defendants alleging selection based on race may rely on a legal presumption that people of all races commit all types of crimes. But a showing that similarly situated offenders have not been prosecuted is an indispensable

element of a selective prosecution claim, and that is no less true when the ground of selection is alleged to be race. The court of appeals' presumption also runs counter to the settled rule that the government is presumed to act in good faith; that presumption can only be overcome by proof of specific facts. And the requirement that a defendant show that similarly situated persons have not been prosecuted does not accept racial stereotypes. Requiring such proof instead recognizes the possibility that, for socio-economic and historical reasons, members of particular groups may predominate in the commission of certain crimes.

The court of appeals also erred in relying on cases holding that statistical disparities can establish a prima facie case of discriminatory effect and intent. Under those cases, a disparity does not exist simply because those prosecuted are predominantly of one race. Rather, a disparity exists only when there is a significant difference between the composition of the group prosecuted and the composition of the group eligible for prosecution, a showing that necessarily requires proof that others who are similarly situated have not been prosecuted. The Court's decisions in *Yick Wo* and *Ah Sin* v. *Wittman*, 198 U.S. 500 (1905), confirm the importance of evidence that similarly situated persons of a different race have not been prosecuted in cases that rely on statistics. In *Yick Wo*, evidence concerning similarly situated offenders was presented, and a violation was found. In *Ah Sin*, no allegation concerning similarly situated offenders was made, and the Court found the claim insufficient as a matter of law.

The court of appeals' concern that defendants who have potentially meritorious claims may be unable

to prove them without discovery is insufficient to change the discovery standard. If there were any substance to respondents' assertion of selective prosecution, they should have had no difficulty producing concrete evidence that similarly situated non-blacks were being prosecuted in the state criminal justice system.

Finally, the principle that a district court's discovery orders are reviewed under an abuse of discretion standard does not affect the analysis in this case. A district court must exercise its discretion in accordance with a correct understanding of the law. Because the district court ordered discovery under an incorrect legal approach, its decision constituted an abuse of discretion.

ARGUMENT

DISCOVERY ON A CLAIM OF SELECTIVE PROSECUTION ON THE BASIS OF RACE MAY NOT BE ORDERED ABSENT EVIDENCE THAT SIMILARLY SITUATED PERSONS OF A DIFFERENT RACE HAVE NOT BEEN PROSECUTED

The court of appeals held that trial courts may order discovery on a claim of selective prosecution based solely on evidence that persons of a particular race have been prosecuted for a particular offense, without any evidence that similarly situated persons of a different race have not been prosecuted. For reasons that follow, that holding is incorrect. Except in cases involving direct admissions by officials of discriminatory purpose, a defendant seeking discovery on a claim of selective prosecution based on race must present evidence establishing that similarly situated persons of a different race have not been prosecuted. Because no such showing was made

in this case, the district court's exercise of its discretion in ordering discovery rested on an erroneous understanding of the law.

A. A Defendant Seeking Discovery On A Claim Of Selective Prosecution Must Make A Substantial Threshold Showing

1. A prosecutor has broad discretion in the enforcement of the criminal laws. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *Wayte* v. *United States*, 470 U.S. 598, 607 (1985) (quoting *Bordenkircher*); see also *Town of Newton* v. *Rumery*, 480 U.S. 386, 396 (1987) (opinion of Powell, J.); *United States* v. *Goodwin*, 457 U.S. 368, 380 n.11 (1982); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980); *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979). That principle is founded on several important considerations. First, prosecutorial discretion is a core element of the Executive's power to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. See *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985); *United States* v. *Nixon*, 418 U.S. 683, 694 (1974); *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922). Separation-of-powers principles therefore constrain judicial review of prosecutorial decisions. Second, "the decision to prosecute is particularly ill-suited to judicial review." *Wayte*, 470 U.S. at 607. The factors that the government must consider in deciding to prosecute, such as the strength of the case, the general deterrence value, and the government's enforcement priorities, "are not

readily susceptible to the kind of analysis the courts are competent to undertake." *Ibid.* Third, judicial review of prosecutorial decisionmaking "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Ibid.* See also *Town of Newton*, 480 U.S. at 396 (opinion of Powell, J); *United States* v. *Lovasco*, 431 U.S. 783, 793-794 (1977). Finally, judicial scrutiny of a prosecutor's charging decisions imposes high costs on the criminal justice system. The purpose of a criminal proceeding is to determine a defendant's guilt or innocence, and examination of the prosecutor's reasons for bringing a prosecution diverts the proceeding from that central issue, resulting in delay that can be "fatal to the vindication of the criminal law." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). See also *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). Those factors "make the courts properly hesitant to examine the decision whether to prosecute." *Wayte*, 470 U.S. at 608.

Although prosecutorial discretion is broad, it is subject to constitutional constraints. In particular, the decision to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); accord *Wayte*, 470 U.S. at 608; *Batchelder*, 442 U.S. at 125. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, * * * the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886).

Claims of selective prosecution are governed by "ordinary equal protection standards." *Wayte*, 470 U.S. at 608. Absent proof of an explicit discriminatory classification, a criminal defendant alleging selective prosecution based on race must therefore show that (1) persons of a difference race in "similar circumstances" have not been prosecuted and (2) the difference in treatment is motivated by an intent to discriminate against members of the defendant's race. *Yick Wo*, 118 U.S. at 374. As the Court stated in *Wayte*, 470 U.S. at 608, a criminal defendant must demonstrate both a "discriminatory effect" and a "discriminatory purpose." See *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272 (1979); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239-241 (1976). Because of the special considerations implicated by judicial inquiry into an exercise of prosecutorial discretion, those two elements of the claim must be satisfied by "exceptionally clear proof." *McCleskey* v. *Kemp*, 481 U.S. 279, 297 (1987). In the absence of such proof, courts must presume that a prosecution for violation of a criminal law has been undertaken in good faith for the purpose of bringing offenders to justice. *United States* v. *Mezzanatto*, 115 S. Ct. 797, 806 (1995); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *United States* v. *Parham*, 16 F.3d 844, 846 (8th Cir. 1994); *United States* v. *Penagaricano-Soler*, 911 F.2d 833, 837 (1st Cir. 1990); *United States* v. *Bassford*, 812 F.2d 16, 19 (1st Cir.), cert. denied, 481 U.S. 1022 (1987); *Attorney General* v. *Irish People, Inc.*, 684 F.2d 928, 947 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983);

United States v. *Falk*, 479 F.2d 616, 620 (7th Cir. 1973) (en banc).

2. The same considerations that make courts reluctant to examine exercises of prosecutorial discretion and that require exceptionally clear proof to establish a claim of unconstitutional selective prosecution also determine the standard that should govern discovery on such a claim. In order to avoid judicial encroachment into an area that the Constitution reserves to the Executive Branch, judicial inquiry into a prosecutor's reasons for bringing a prosecution should not even begin unless there is a substantial and concrete basis for suspecting unconstitutional action. That prerequisite to judicial inquiry is especially important because criminal defendants often "transform [their] resentment at being prosecuted into the ascription of improper and malicious actions to the [government's] advocate." *Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976). Absent threshold screening to prevent abuses, defendants would be able to employ claims of selective prosecution and associated discovery demands as powerful tools to divert a prosecutor's "energy and attention * * * from the pressing duty of enforcing the criminal law," *ibid.*, and to delay the resolution of criminal charges against them. See *United States* v. *Moon*, 718 F.2d 1210, 1230 (2d Cir. 1983) ("Unwarranted judicial inquiries" into prosecutorial motive "undermine the strong public policy that resolution of criminal cases not be unduly delayed by litigation over collateral matters."), cert. denied, 466 U.S. 971 (1984).[1]

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[1] The Sixth Amendment guarantee of a speedy trial, the federal Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, Rules 2 and 50 of the Federal Rules of Criminal Procedure, and Rule

Accordingly, before obtaining discovery on a claim of selective prosecution, a criminal defendant is required to make a substantial threshold showing on each element of the claim. By requiring a significant threshold showing, courts may avoid unwarranted and highly intrusive inquiries into a prosecutor's judgment about why it was important to bring a case. At the same time, that standard will serve to prevent the needless diversion of government and judicial resources from the adjudication of a criminal case to the disposition of a selective prosecution motion.

45(b) of the Federal Rules of Appellate Procedure all provide for the prompt disposition of criminal cases. Because of the important public policy of expediting the resolution of criminal charges, the right to discovery in criminal cases is sharply limited. "There is no general constitutional right to discovery in a criminal case." *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977). Due process requires the government to disclose exculpatory evidence that is material to guilt or punishment (*Brady* v. *Maryland*, 373 U.S. 83 (1963)), but the Federal Rules of Criminal Procedure, primarily Rule 16, otherwise govern the extent of discovery in criminal cases. Rule 16 contains specified categories of information subject to disclosure by the prosecution and defense, requiring in general that those items subject to discovery must be relevant and material to the defense of the criminal charges. Permitting discovery on claims of selective prosecution where there has not been a substantial threshold showing would undermine that policy and allow criminal defendants to circumvent the limitations on discovery built into the Federal Rules. See *United States* v. *Murdock*, 548 F.2d 599, 600 (5th Cir. 1977) (a threshold showing of selective prosecution is required because "[t]o hold otherwise would encourage the assertion of such defense, no matter how spurious, as a means of burdening criminal trials with massive discovery of material completely irrelevant and immaterial to the defendant's case").

The Court's decision in *Wade* v. *United States*, 504 U.S. 181 (1992), supports that approach. In *Wade*, the Court considered whether a court may review a claim that the government unconstitutionally refused to file a motion for a departure from a mandatory minimum sentence based on the defendant's substantial assistance to the prosecution, and, if so, what showing a criminal defendant must make to obtain discovery on that claim. The Court held that such a discretionary decision should be treated no differently from a prosecutor's other decisions and that district courts therefore have authority "to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive." *Id.* at 185-186. The Court then noted the defendant's concession that, in order to obtain discovery on such a claim, the defendant was required to make a "substantial threshold showing" of an unconstitutional motive. *Id.* at 186. Because the defendant had failed to make such a showing, the Court held that discovery was properly denied. *Id.* at 186-187. In *Wade*, as here, the requirement of a substantial threshold showing properly balances the interest of courts in protecting the equal protection rights of individuals with the necessary judicial hesitance to explore the motives of prosecutors in bringing a criminal case.

B. The Showing To Obtain Discovery Must Include Some Evidence That Similarly Situated Persons Have Not Been Prosecuted

A key threshold requirement that a defendant must meet in the selective prosecution context is the presentation of concrete evidence on both elements of a selective prosecution claim, including a threshold

showing of "selection," *i.e.*, that others who are similarly situated have not been prosecuted. That principle has been uniformly recognized and applied in the courts of appeals.

In *Attorney General* v. *Irish People, Inc.*, 684 F.2d 928, 932 (1982), cert. denied, 459 U.S. 1172 (1983), the D.C. Circuit articulated the governing principles with particular clarity. There, the court held that, in order to obtain discovery from the government on a claim of selective prosecution, a defendant must not only introduce evidence of improper motive, but must also "make a colorable showing that he has been especially singled out, that there exist persons similarly situated who have not been prosecuted." 684 F.2d at 946. The court reasoned that "a demonstration of selection is indispensable for the defense and * * * the burden of so demonstrating lies squarely on the defendant." *Ibid.* It explained that "[i]f, as the district court found, there was no one to whom defendant could be compared in order to resolve the question of selection, then it follows that defendant has failed to make out one of the elements of its case. Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Ibid.* The court made clear that evidence that there are similarly situated offenders is essential not only to prove a claim of selective prosecution, but also to obtain discovery on such a claim (*id.* at 947-948 (footnote omitted)):

> [W]e can see no reason for throwing out half the standard on the discovery issue. If either part of the test is failed, the defense fails; thus it makes sense to require a colorable claim of both before subjecting the Government to discovery. Since it is well established that, even in the context of a criminal prosecution, the Government enjoys a presumption of having "undertaken [the action] in good faith and in nondiscriminatory fashion," it also makes sense that the burden be generally on the defendant to show the necessary elements at each procedural stage.

The court's analysis in *United States* v. *Cooks*, 52 F.3d 101, 105 (5th Cir. 1995), a case similar to the present one, also illustrates the correct approach. There, a defendant prosecuted for conspiring to distribute more than 50 grams of crack sought discovery on a claim that blacks were selectively prosecuted in federal rather than state court. In support of that request, the defendant introduced statistical evidence that the overwhelming majority of those arrested for possession of crack are black and that such arrests have increased tenfold in recent years. *Ibid.* The Fifth Circuit held that discovery was properly denied because the statistical evidence "fail[ed] to satisfy the first prong of the selective prosecution inquiry; it d[id] not establish that white defendants committing this offense were prosecuted in state rather than federal court." *Ibid.*

The Second, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits have all similarly held that discovery may not be ordered against the government on a claim of selective prosecution absent a threshold showing on both elements of the claim. Those circuits have therefore affirmed district court decisions denying discovery where the defendant failed to make a threshold showing that similarly situated persons were not prosecuted. See *United States* v. *Fares*, 978 F.2d 52, 59-60 (2d Cir. 1992) (no abuse of discretion in

refusing to order discovery where defendant did not offer "evidence as to large numbers of similarly situated persons known to the government who had not been prosecuted"); *United States* v. *Greenwood*, 796 F.2d 49, 52-53 (4th Cir. 1986) (discovery properly denied because defendant failed to make nonfrivolous showing that he had been singled out while others who were similarly situated had not been prosecuted); *United States* v. *Peete*, 919 F.2d 1168, 1176 (6th Cir. 1990) (discovery properly denied because defendant, "aside from his own self-serving affidavit and an affidavit from his counsel, did not point to any evidence that others similarly situated were not prosecuted"); *United States* v. *Schmucker*, 815 F.2d 413, 418-419 (6th Cir. 1987) (without any evidence of others similarly situated who were not prosecuted, defendant not entitled to discovery); *United States* v. *Mitchell*, 778 F.2d 1271, 1277 (7th Cir. 1985) (to compel discovery, defendant must show colorable basis for selective prosecution claim, which must include some evidence that defendant was singled out for prosecution while others were not); *Parham*, 16 F.3d at 846-847 (8th Cir.) (discovery properly denied because, "[w]here a defendant cannot show anyone in a similar situation who was not prosecuted, he has not met the threshold point of showing that there has been selectivity in prosecution"); *C.E. Carlson, Inc.* v. *SEC*, 859 F.2d 1429, 1437-1438 (10th Cir. 1988) (discovery properly denied because securities dealers sanctioned by SEC "were unable to show that others similarly situated were not subjected to enforcement proceedings"). Even the Ninth Circuit had, before the decision in this case, correctly required defendants seeking discovery from the government to introduce "solid, credible" evidence that other similarly situ-

ated offenders had not been prosecuted in order to obtain discovery on a claim of selective prosecution. *United States* v. *Bourgeois*, 964 F.2d 935, 939 (9th Cir.), cert. denied, 113 S. Ct. 290 (1992).

The substantial threshold showing necessary to permit a court to order discovery on a selective prosecution claim does not require proof of a prima facie case of selective prosecution. The evidence need not be so forceful or comprehensive as would be required to establish a prima facie case. But a mere nonfrivolous assertion of selective prosecution is not enough to justify an order requiring discovery. If defendants were not required to come forward with more than a nonfrivolous assertion, they could too easily provoke unwarranted inquiries and needless delay. A substantial threshold showing lies between those two poles. It requires concrete evidence on both elements of a selective prosecution claim sufficient to show a reasonable likelihood that unconstitutional selective prosection has taken place. The standard will "discourage fishing expeditions, protect legitimate prosecutorial discretion, [and] safeguard government investigative records. " *Bourgeois*, 964 F.2d at 940.

Requiring defendants to make a significant threshold showing that others who are similarly situated have not been prosecuted is a particularly practical device for courts to use in determining whether or not further judicial inquiry may be warranted. The question whether similarly situated offenders have been prosecuted is readily susceptible to objective proof. At the same time, the requirement that a defendant make a significant threshold showing that others who are similarly situated have not been prosecuted "still allow[s] meritorious

claims to proceed." *Bourgeois*, 964 F.2d at 940. In those rare instances in which there are reasonable grounds to credit and explore a claim of selective prosecution, it should not be difficult for a criminal defendant to make an objective showing of disparity of treatment.

Experience in the courts of appeals demonstrates that evidence concerning similarly situated offenders is not in the government's exclusive possession. See *United States* v. *Adams*, 870 F.2d 1140, 1145-1146 (6th Cir. 1989) (discovery ordered where record suggested that taxpayers who underreported income and voluntarily amended returns and paid deficiencies, as defendants did, were not prosecuted); *United States* v. *Gordon*, 817 F.2d 1538, 1540 (1987) (discovery affirmed; colorable entitlement shown where defendants presented some evidence of similar violations by other persons who were not prosecuted, as well as evidence of invidious intent), vacated in part on rehearing on other grounds, 836 F.2d 1312 (11th Cir.), cert. dismissed, 487 U.S. 1265 (1988); *United States* v. *Holmes*, 794 F.2d 345, 348 & n.3 (8th Cir. 1986) (defendant submitted names of 30 white farmers not prosecuted for same conduct; court's review of prosecution records *in camera* showed adequate explanation for defendant's allegations); *United States* v. *Hoover*, 727 F.2d 387, 389 (5th Cir. 1984) (defendant met first part of test for selective prosecution by showing that only three of the 300 striking air traffic controllers in the Houston area were prosecuted); *United States* v. *Hazel*, 696 F.2d 473, 475 (6th Cir. 1983) (showing that 34 other members of Michigan tax revolt group committed same offense but were not prosecuted probably enough to demand evidentiary hearing on first prong of selective prosecution test, but defendants failed to

show evidence of intent to discriminate); *United States* v. *Diggs*, 613 F.2d 988, 1003-1004 (D.C. Cir. 1979) (congressman offered evidence that two other congressmen who had engaged in similar conduct were not prosecuted; court assumed that first prong of discovery standard was met, but denied discovery on the ground that there was no evidence of discriminatory intent), cert. denied, 446 U.S. 982 (1980); *United States* v. *Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972) (conviction reversed based on defendant's showing that six others who had also refused to complete census form were not prosecuted). A requirement that a defendant produce some evidence of similarly situated offenders to obtain discovery is therefore a fair burden to place on a defendant who seeks to inquire into the prosecutor's motives for bringing a criminal case.

Respondents did not meet that burden. In support of their claim of selective prosecution, respondents produced evidence that all of the 24 crack prosecutions closed by the Federal Public Defender in 1991 involved black defendants. Under the correct legal standard, that evidence was legally insufficient to justify a discovery order. As the original panel in this case explained, that evidence "demonstrates only that others *have* been prosecuted, not that others similarly situated have not." Pet. App. 80a. The showing therefore contains "a total lack of evidence" (*ibid.*) on an essential element of a selective prosecution claim: the disparate treatment of offenders who are similarly situated but for their race. Thus, as the

original panel concluded, the district court's discovery order was unwarranted.[2]

C. The Court Of Appeals' Reasons For Eliminating The Similarly Situated Offender Requirement Are Unsound

The court of appeals recognized that there was no factual showing in this case that the government had failed to prosecute similarly situated persons of a different race. The court held, however, that such evidence was unnecessary. The court of appeals gave several reasons for dispensing with the similarly situated offender requirement universally recognized by other circuits. Those reasons are unsound.

1. The court first held that evidence of similarly situated offenders is unnecessary because of a legal presumption "that people of all races commit all types of crimes." Pet. App. 19a & n.6. According to the court, a criminal defendant can rely on that presumption, unless the government introduces "compelling contrary evidence." *Id.* at 19a. The court stated that "[t]he fact that evidence of similarly situated persons who were not prosecuted was submitted in other kinds of selective prosecution claims is of no significance in the context of a selective prosecution case based on race" because, in the court's view, imposing such a requirement in relation to race-based claims "would be accepting unwarranted racial stereotypes." *Id.* at 19a n.6.

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[2] The district court did not rely on respondents' affidavits in exercising its discretion to order discovery in this case. J.A. 217. They are therefore irrelevant here. In any event, those affidavits are also legally insufficient to support a discovery order. See note 4, *infra*.

The need to identify similarly situated persons who have not been prosecuted, however, does not diminish simply because the claim is one of race-based selective prosecution. As the panel in this case explained, "'[s]elective prosecution' implies that a selection has taken place," Pet. App. 80a, and that principle is applicable to claims of selective prosecution based on race. Evidence that members of a particular racial group have been prosecuted fails to provide any basis for believing that a selection has taken place, unless there is evidence that similarly situated persons of a different race have not been prosecuted. *Ibid.* Absent concrete evidence to that effect, "the most reasonable conclusion is that the defendant was selected for prosecution because the government believed the defendant committed the offense; the fact that the defendant is a member of a protected class is coincidental." *Ibid.*

In addition, as noted above, "in the context of a criminal prosecution, the Government enjoys a presumption of having 'undertaken [the action] in good faith and in nondiscriminatory fashion.'" *Irish People, Inc.*, 684 F.2d at 947. This Court has made clear that "tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." *Mezzanatto*, 115 S. Ct. at 806, quoting *Town of Newton*, 480 U.S. at 397. Accordingly, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Chemical Foundation, Inc.*, 272 U.S. at 14-15; see *McCleskey*, 481 U.S. at 297. Reliance on a presumption, rather than actual proof, to permit the defendant to make a threshold showing of a discriminatory effect runs counter to that settled rule. To overcome that presumption of prosecutorial

good faith, the defendant must adduce facts, not assumptions.

Nor does insisting on evidence that other similarly situated offenders of another racial group have not been prosecuted accept racial stereotypes. Rather, it recognizes the empirical possibility that, for socio-economic and historical reasons, members of particular racial and ethnic groups may predominate in the commission of certain crimes. The government in fact presented affirmative evidence in this case supporting the conclusion that black individuals dominate large-scale dealing in crack, while members of other racial groups dominate the sales of other drugs. See Pet. App. 22a; see *id.* at 72a-73a (panel opinion). Information from the Sentencing Commission confirms that particular crimes can be associated with particular racial groups. According to the Commission's most recent nationwide statistics, more than 90% of those persons sentenced for trafficking in crack cocaine were black. United States Sentencing Comm'n, *Annual Report 1994*, at 107 (Table 45). In contrast, 93.4% of those sentenced for trafficking in LSD, 100% of those sentenced for antitrust violations, and 91.4% of those sentenced for pornography and prostitution offenses were white. *Id.* at 41, 107 (Tables 13, 45). In addition, of those sentenced for trafficking in methamphetamine, 72.9% were white, while only 1.6% were black. *Id.* at 107 (Table 45). The court of appeals, in the interest of avoiding what it characterized as racial stereotypes, was not free to adopt an evidentiary presumption that has neither a rational nor a factual foundation. Cf. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245-246 (1988); *Turner* v. *United States*, 396 U.S. 398, 404-405 (1970).

2. In dispensing with the similarly situated offender requirement, the court of appeals also relied on cases indicating that statistical disparities alone can constitute sufficient evidence of discriminatory effect and intent to establish a prima facie case of selective prosecution. The court stated that the standard for obtaining discovery is lower than that for establishing a prima facie case. It then reasoned that because a showing of a statistical disparity in the race of those persons prosecuted would establish a prima facie case, it is also sufficient to warrant discovery. Pet. App. 10a-11a. But the court's application of its analysis reveals its misunderstanding of the concept of a "disparity." The court held that respondents' evidence that all 24 crack prosecutions closed by the Federal Public Defender in 1991 involved black defendants established a statistical disparity, and that respondents were therefore relieved of the necessity of showing that others who are similarly situated have not been prosecuted. *Id.* at 15a-16a; see *id.* at 10a n.1 (evidence of similarly situated offenders is not required when there is statistical evidence of a disparity in the race of those prosecuted).

The court's chain of reasoning is seriously flawed. This Court has held that, in some circumstances, statistical disparities can establish a prima facie case of discriminatory effect and intent. *McCleskey*, 481 U.S. at 293-294 & nn.12, 13 (discussing cases); *Village of Arlington Heights*, 429 U.S. at 266; *Yick Wo*, 118 U.S. at 373-374. Under this Court's decisions, however, a disparity does not exist just because the persons prosecuted are predominantly of one race. Rather, a disparity exists when there is a substantial difference between the racial composition of the group prosecuted and the racial composition of the group

eligible for prosecution. See *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 & n.13 (1977); *Yick Wo*, 118 U.S. at 373-374. Demonstrating such a disparity necessarily entails proof that others who are similarly situated have not been prosecuted. Absent such a showing, the evidence fails to cast any doubt on the most obvious race-neutral explanation for the prosecutions brought: that the pool of persons prosecuted mirrors the pool of persons eligible for prosecution.[3]

Yick Wo and the Court's subsequent decision in *Ah Sin* v. *Wittman*, 198 U.S. 500 (1905), demonstrate that statistical evidence is capable of showing discriminatory effect and intent only when it involves proof that similarly situated persons have not been prosecuted. In *Yick Wo*, an ordinance prohibited the operation of laundries constructed of wood except by persons who obtained permission from the Board of Supervisors. The evidence showed that 200 laundry owners of Chinese ancestry petitioned the Board for permission to continue their businesses in wooden buildings, and every one of those petitions was denied. 118 U.S. at 359 (Statement of Facts). In contrast, of the petitions

[3] In addition, where, as here, "the discretion that is fundamental to our criminal process is involved," *McCleskey*, 481 U.S. at 313, statistical evidence would be capable of proving a violation of the Equal Protection Clause only if the disparity between the racial composition of those selected and the racial composition of those eligible for selection is so "stark" as to be "unexplainable" on any ground other than race. *Id.* at 293-294 & n.12; *Village of Arlington Heights*, 429 U.S. at 266; *Yick Wo*, 118 U.S. at 373. Because there was no showing of any disparity in this case, the question of how extreme such a disparity must be to prove unconstitutional selective prosecution is not at issue here.

filed by the 80 laundry owners of non-Chinese ancestry, all but one was granted. *Ibid.* As a result, 150 laundry owners of Chinese ancestry were arrested for violating the ordinance, while no laundry owners of non-Chinese ancestry were arrested. *Ibid.* The Court held that those facts established a violation of the Equal Protection Clause. *Id.* at 373-374. The Court explained that the Board had engaged in disparate treatment of persons of Chinese ancestry and non-Chinese ancestry who were in "similar circumstances" and that no reason for the disparate treatment was possible except for "hostility" to persons of Chinese ancestry. *Id.* at 374. The finding of a violation in *Yick Wo* therefore depended on evidence that similarly situated persons had not been prosecuted.

In *Ah Sin*, an ordinance prohibited the display of gambling implements in a barred or barricaded room. The defendant alleged that the ordinance was enforced only against persons of Chinese ancestry. Because the defendant failed to allege that there were persons of non-Chinese ancestry who had violated the ordinance, however, the Court held that the defendant had failed to allege the facts necessary to establish a violation of the equal protection principle established in *Yick Wo*. The Court reasoned that

> [i]n the *Yick Wo case* there was not a mere allegation that the ordinance attacked was enforced against the Chinese only, but it was shown that not only the petitioner in that case, but two hundred of his countrymen, applied for licenses, and were refused, and that all the petitions of those not Chinese, with one exception, were granted. The averment in the case at bar is that

> the ordinance is enforced "solely and exclusively against persons of the Chinese race and not otherwise." There is no averment that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced.

198 U.S. at 507-508.

Respondents' statistical evidence contains the same flaw identified in *Ah Sin*: the absence of any evidence that similarly situated persons of a different race were not prosecuted. The court of appeals' view that statistical evidence need not include such information in order to prove a violation of the Equal Protection Clause is incorrect. See *United States* v. *Cooks*, 52 F.3d at 105 (statistics reflecting that the overwhelming majority of those arrested for possession of crack are African-American failed to satisfy first prong of selective prosecution inquiry because it did not establish that white defendants committing this offense were prosecuted in state rather than federal court); *United States* v. *Gutierrez*, 990 F.2d 472, 476 (1993) (statistics showing a high percentage of certain groups being prosecuted insufficient to establish that similarly situated persons are not being prosecuted), overruled by *United States* v. *Armstrong*, 48 F.3d 1508, 1513 n.1 (9th Cir. 1995) (en banc); *United States* v. *Huff*, 959 F.2d 731, 735 (8th Cir.) (evidence from newspaper article stating that 87% of arrests in reverse sting cases in Minneapolis were African-Americans insufficient to establish prima facie case of selective prosecution because there was no evidence that similarly situated

non-African-Americans were not being prosecuted for similar conduct), cert. denied, 113 S. Ct. 162 (1992).

3. The court of appeals' elimination of the similarly situated offender requirement also appears to have been animated by its concern that defendants who have potentially meritorious claims may be unable to prove their cases without obtaining discovery from the government. Pet. App. 11a-12a. Courts have long required defendants to offer at least some evidence on both prongs of the selective prosecution defense before ordering discovery, however, and there is no basis for assuming that defendants with valid claims cannot meet those standards. As previously discussed, evidence concerning similarly situated offenders is not in the government's exclusive possession. See pages 26-27, *supra*.

The present case is illustrative. If there were any substance to respondents' claim that the United States Attorney improperly selects only blacks in prosecutions for dealing in crack, respondents should have had no difficulty producing concrete evidence that similarly situated persons of other races were being prosecuted by the State of California. Although information concerning persons prosecuted by the State is readily accessible to the public, respondents failed to produce such evidence.[4]

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[4] The affidavits submitted by respondents concerning non-black crack dealers contain only vague, conclusory, and impressionistic hearsay. They do not provide the kind of solid and credible evidence necessary to support a discovery order. Cf. *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 724-725 (1990). Those affidavits also fail to include any information that would suggest that crack dealers prosecuted in the state courts were similarly situated to respondents. Respondents were indicted for conspiring to distribute more than 50 grams

4. Finally, the court of appeals relied on the principle that a district court's discovery orders must be reviewed under an abuse of discretion standard. Pet. App. 7a; *id.* at 29a-31a (Wallace, J., concurring). A district court must exercise its discretion, however, on the basis of correct legal principles. As this Court has stated, "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975), quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d) (Marshall, C.J.). When a district court exercises its discretion on the basis of an erroneous view of the law, it necessarily abuses its discretion. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402, 405 (1990). That is the situation here. As we have discussed, the district court's order is premised on the incorrect understanding that discovery may be ordered based solely on evidence that persons of a particular race have been prosecuted for a particular offense, without evidence that similarly situated persons of a different race have not been prosecuted for that offense. In view of that legal

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of cocaine and that conspiracy involved the use of firearms. The affidavits do not assert that there are any non-black crack dealers prosecuted in state court who have trafficked in comparable quantities of crack and who have used firearms in connection with that trafficking. For those reasons, the panel correctly concluded that the affidavits did not assist respondents in making the threshold showing necessary to obtain discovery. Pet. App. 82a-83a (describing the affidavits as containing unsubstantiated hearsay, noting that they do not include any information on the quantity of drugs involved or the presence of firearms, and concluding that they constitute "flimsy" and "ineffective" evidence).

error, the district court abused its discretion in ordering discovery in this case.

The court's error is particularly evident on the facts of this case. Respondents introduced evidence concerning an extremely small, unrepresentative sample of defendants who were prosecuted. That evidence proves little, if anything, about the actual pool of persons prosecuted, and nothing about the pool of persons eligible for prosecution. In contrast, the government offered specific information on the reasons it brought the charges in this case: the decision to prosecute was based on the large quantity of drugs involved, the number of sales and defendants, the presence of firearms violations intertwined with the drug offenses, the involvement of a federal agency in the investigation, the criminal histories of the defendants, and the strength of the evidence. J.A. 81. As the panel concluded, if discovery can be ordered on that kind of record, "district courts too often and unnecessarily could become immersed in the workings of a coordinate branch of government, to the benefit of neither." Pet. App. 84a. Under the controlling legal standards, the order of discovery in this case was an abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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